SERVED: August 5, 1992

NTSB Order No. EA-3632

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of July, 1992

BARRY LAMBERT HARRIS, Acting Administrator, Federal Aviation Administration, Complainant, v. KEVIN DALE FINKE, Respondent.	Docket SE-8661

OPINION AND ORDER

Both respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on January 31, 1989, following an evidentiary hearing.[1] Citing Administrator v. Musquiz, 2 NTSB 1471 (1975), the Administrator requests that the original sanction, a 180-day suspension, be reinstated. Respondent requests: that, based on

[1]The initial decision, an excerpt from the hearing transcript, is attached.

the stale complaint rule,[2] the Board dismiss the first 3 of 5 counts of low flight; that it dismiss the fourth and fifth counts for failure of proof; and if, for any reason it fails to dismiss all charges, that the Board remand the action to the law judge on the issue of sanction alone, with specific instructions to disregard prior violation history. We grant the Administrator's appeal, and deny that of respondent.

The Administrator cited respondent with five instances of low flight in a Mooney Model M-200 over a residence and property in Larkspur, CO, a remote area. Respondent was alleged to have operated the plane within 500 feet of persons and structures at an address identified as the residence of the Redeker family. Mr. and Mrs. Redeker were the complaining witnesses, and testified at the hearing.

Violations of § § 91.79(c) and 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) were alleged in connection with the flights, which took place July 18, 21, 29, August 27, and September 9, 1986.[3] Respondent admitted that he had been

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[2]49 C.F.R. 821.33.

[3]§ 91.79(c) provides:

> Except where necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
> * * * * * *
> (C) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 91.9, Careless or reckless operation, provides:

pilot-in-command on the dates cited in the complaint, and that he had flown in the vicinity of the Redeker residence to "wing-wave" at his in-laws, whose residence was nearby. Tr. at 68-73. The issue, then, was the aircraft's altitude.

The law judge made credibility determinations accepting testimony of the Redekers that respondent flew at altitudes below the 500-foot minimum. In doing so, the law judge noted testimony that the Redekers could read the registration numbers of the plane with the naked eye, and that they were able to estimate the height of the plane over buildings on their property.[4]

The threshold issue in this case is whether the Board's decision in Order EA-2819 should be reevaluated. Respondent contends that the hearing record discredits prior testimony relied on by the Board and supports dismissal of the complaint as to three of the incidents.

The Board's decision in Order EA-2819 was based on a chronology of events provided by the Administrator. According to this evidence, the Administrator did not receive information regarding these low flights until October 1986.[5] At the hearing, the Redekers suggested that they had contacted the FAA in July.

(..continued)

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[4]The latter testimony was made more credible by the fact that Mr. Redeker's was a surveyor and, thus, used to measuring distances.

[5]If so, the notice of proposed certificate action, served January 29, 1987, would have met the 6-month requirement the stale complaint rule imposes.

If this were true, and the 6-month clock began to run in July, the stale complaint rule could require dismissal of certain charges.

The law judge, however, after hearing this testimony, concluded that these witnesses confused notification to their lawyer with notification of the FAA. Initial decision at 105, 110. Supporting the law judge's conclusion is the testimony of the FAA witness, Mr. Riggins, who had no record or recollection of any telephone call from the Redekers. Id. at 106. The record is not so contrary to the law judge's view that it will be disturbed on appeal, based as it is on an evaluation of oral testimony. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge).

Respondent's second allegation -- that the law judge erred in admitting evidence of his prior violation history when the Administrator failed to allege such a history in the complaint -- is contrary to established precedent. See Administrator v. Read, 3 NTSB 2694 (1980), aff'd Read v. NTSB et al., 661 F.2d 253 (D.C. Cir. 1981), cert. denied 454 U.S. 1034 (1981); and Administrator v. Mears, 2 NTSB 1943, 1944 (1975).

Respondent's third claim of error is that the preponderance of the evidence does not support the finding of violations on August 27 and September 9. Respondent initially suggests the record lacks evidence to identify the aircraft or the pilot.

This argument is foreclosed, however, by respondent's own testimony and admission. See Tr. at 68-72.

Respondent then claims that the Administrator has not met his burden of proof for the September 9th flight, suggesting that contradictions in the Redekers' testimony would preclude any finding. We disagree. Ultimately, the law judge's findings depend solely on credibility decisions, as there is no documentary evidence to establish or refute the allegations. We cannot find it arbitrary or capricious for the law judge, especially given their experience with the prior four flights, to accept the Redekers' testimony that, on the September 9 after-dark flight, respondent operated the aircraft below 500 feet.

Having rejected respondent's claims of error, we turn to the Administrator's appeal from the sanction reduction. The Administrator claims that the law judge did not find those "clear and compelling" reasons required by Musquiz to alter the sanction. We agree.

The law judge cited many factors in his discussion modifying the sanction. Most of those factors -- prior violation history (and, thus, prior lack of deterrence), and number of flights here -- do not weigh in on the side of a reduced sanction. The only one that does is "economic impact." Regardless of the fact that the law judge notes he is giving only "slight consideration" to this factor, economic impact is not a clear and compelling reason to reduce this sanction. See, e.g., Administrator v. Johnson, 5 NTSB 691 (1985) and Administrator v. Colvig, 4 NTSB

202 (1982). Accordingly, the law judge's reduction in sanction is not justified under Musquiz, and will be reversed. The 180-day suspension will be reinstated.[6]

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's appeal is granted; and

3. The 180-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[7]

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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[6]In reply, respondent suggests that a 180-day suspension is too harsh, but makes no effort to compare it to prior cases. In fact, precedent supports suspensions of 30 days for individual incidents of low flight. See, e.g., Administrator v. Hoover, 3 NTSB 419 (1977); and Administrator v. Emetrio, 4 NTSB 1126 (1983).

Respondent also replies that Musquiz is bad law, inconsistent with Section 609 of the Federal Aviation Act, which requires that the hearing be de novo and that the Board not be bound by the Administrator's findings of fact. Musquiz does not violate Section 609 simply because deference is given to the Administrator's sanction and the burden is on respondent to show why that sanction should be modified. Respondent, moreover, offers no policy reasons we have not considered in our case-by-case application of the doctrine.

[7]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).